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FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 89

ALTON J. LEMON, ET AL., *Appellants*

v.

DAVID H. KURTZMAN, ET AL., *Appellees*

RESPONSE TO CERTAIN MOTIONS TO FILE BRIEFS AMICUS CURIAE

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Appellee Schools hereby respond to:

1. Motion For Leave to File Brief Amici Curiae by Center for Law and Education, Harvard University, *et al.*, filed January 25, 1971.
2. Motion For Leave to File Brief Amicus Curiae by National Association of Laymen, filed February 8, 1971.

3. Motion For Leave to File Brief for Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, *et al.*, as *amici curiae*, filed February 2, 1971.

4. Letter dated February 3, 1971 (filing date unknown) of Peter Costas, Esquire, attorney for the last-named *amici curiae*, requesting opportunity to present oral argument before, during, or following oral argument in the *Lemon*, or *Tilton*, or *Earley* or *Robinson* cases.

I. THE MOTIONS SHOULD BE DENIED AS VIOLATING, IN THE EXTREME, THIS COURT'S REQUIREMENT OF TIMELINESS

The Motions and the letter have all been presented to the Court upon the eve of the generally expected time of oral argument in the above-entitled case. The Clerk, by letter dated January 25, 1971, notified all counsel in the *Lemon, Tilton, Earley* and *Robinson* cases that they should be present for oral argument on March 2, 1971. Rule 42(3) provides in part:

> "3. When consent to the filing of a brief of an *amicus curiae* is refused by a party to the case, a motion for leave to file may *timely* be presented to the court." (Emphasis supplied).

The Center for Law and Education sought consent of Appellee Schools only on January 8, 1971, this consent being then promptly refused.

The National Association of Laymen sought consent of Appellee Schools on October 12, 1970. The consent was neither given nor refused, in view of the fact that the letter seeking consent did not specify any position which the Association would take. Again it is to be

stressed that, even if the Association considered the consent to have been refused, it filed its Motion only on February 8, 1971.

Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, *et al.*, never sought Appellee Schools' consent to file a brief *amicus curiae* in this case. Therefore those entities have not even observed the antecedent requirement respecting refusal of consent.

The letter of Peter Costas, Esquire, seeking leave to make oral argument, must be deemed to depend upon the foregoing Motion of Connecticut State Conference of Branches of the NAACP, Connecticut Civil Liberties Union, *et al.* This, and the Motion, followed upon the unsuccessful attempt of the same organizations, in concert with counsel for Plaintiffs in *Lemon, DiCenso, Earley* and *Robinson,* to have the Court delay its projected hearings in *Lemon, Tilton, Earley* and *Robinson* until such time as a case not yet appealed should possibly be brought before it.

Each of the three motions has been accompanied by a brief of an average length of 37 printed pages, with a total of 227 separate citations to authority, plus various exhibits and appendices. An extraordinary burden is thus sought suddenly to be thrust upon all parties Appellee in *Lemon,* as well as upon this Court. In no sense can these Motions be deemed timely. *Lemon* v. *Kurtzman* has now been before this Court—to the knowledge of counsel for each of the groups now seeking to present a position therein—since April 20, 1970 (probable jurisdiction noted), the appeal therein having been filed on December 17, 1969. All have had abundant time within which to seek to file briefs.

Appellee Schools readily consented to the filing of all briefs *amicus curiae*, those adverse to their position and those favorable to their position, for which consent was timely sought, *viz.*,

BRIEFS ADVERSE

Americans United for Separation of Church and State (brief filed May 27, 1970).

United Americans for Public Schools (brief filed June 1, 1970).

American Association of School Administrators (and six other organizations) (brief filed July 10, 1970).

American Jewish Congress (and four other organizations) (brief filed July 15, 1970).

BRIEFS FAVORABLE

School District of Philadelphia (brief filed August 7, 1970).

The Long Island Conference of Religious Elementary and Secondary School Administrators (brief filed August 10, 1970).

Pennsylvania AFL-CIO (brief filed August 10, 1970).

Attorney General of Ohio, Cleveland Public School District; Youngstown Public School District (brief filed August 11, 1970).

City of Pittsberg (brief filed August 12, 1970).

National Association of Independent Schools (brief filed August 13, 1970).

School District of the City of Scranton (brief filed August 13, 1970).

City of Erie (brief filed August 13, 1970).

Citizens for Educational Freedom (brief filed August 13, 1970).

National Catholic Educational Association (and for other organizations) (brief filed August 14, 1970).

Polish American Congress, Inc. (and 14 other organizations) (brief filed August 24, 1970).

National Jewish Commission on Law and Public Affairs (brief filed August 27, 1970).

The Motions and the letter in question are objectionable in other respects, so far as proper practice before this Court is concerned. The Motion of the Center for Law and Education, for example, purports to speak for ten schools, or groups of schools. Yet not one of these is identified even to the extent of providing its address. Nor do the Motions of these applicants reveal any interest which is not already extensively represented in briefs of parties and of *amici* already timely presented to the Court. No prejudice can possibly result to any interest—whether organizational or merely ideological—from strict compliance with the Rules which this Court has laid down in order to help insure orderliness of procedure and fairness in result. But the gravest injury can result to litigants at whom growing practices related to so-called "associational jurisprudence" or "litigational engineering" are directed—practices ranging from *in terrorem* press conferences at the start of sponsored litigations, efforts

in concert to manage the calendar of hearings, and other devices for pressuring the Court.

Respectfully submitted,

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